

**Statement of Daimler Trucks North America LLC and Detroit Diesel Corporation**  
EPA Notice of Proposed Rulemaking:  
Nonconformance Penalties for On-Highway Heavy-Duty Diesel Engines  
March 5, 2012 Public Hearing

I. **Introduction**

Good morning/afternoon. My name is Don Keski-Hyynila [Manager of Compliance and Regulatory Affairs]. Daimler Trucks North America LLC ("DTNA") and Detroit Diesel Corporation ("DDC") welcome this opportunity to present publicly our comments on EPA's Notice of Proposed Rulemaking ("NPRM") establishing nonconformance penalties for on-highway heavy-duty diesel engines for the 2010 NOx standard, and EPA's Interim Final Rule, which became effective January 31, 2012. We at DTNA have enjoyed a very good working relationship with the EPA, for example on the greenhouse gas regulations, to which we recently certified our Model Year 2013 heavy-duty truck products, one year early. Additionally we recently completed an EPA selective engine audit the results of which confirmed compliance of our SCR equipped Detroit branded heavy duty on-highway engines to the very stringent 0.20 g/bhp-hr NOx standard.

That said, the recent NCP NPRM and Interim Final Rule have not followed suit. As EPA knows from our stay request, DTNA and DDC do not believe that EPA has met the statutory and regulatory requirements for establishing this NCP. EPA would have benefited from formal comments before the Interim Final Rule became effective. We hope that EPA carefully considers, and that the Final Rule reflects, the comments EPA receives today and the more detailed written comments that will be submitted later during this comment period.

II. **EPA Has Not Met the Legal Criteria Required To Issue NCPs**

NCPs are intended to provide a limited exception to meeting regulatory emissions standards where EPA finds that the regulatory lead time it has provided is insufficient to enable manufacturers to develop the technology necessary to meet the standards. By paying NCPs, such manufacturers are allowed, on a limited basis, to produce and sell engines that do not comply with the standard. Congress recognized that an escape clause is desirable under certain limited circumstances where

the required technology does not yet exist, so that technological laggards are not immediately forced out of the marketplace when EPA promulgates more stringent standards.

The Clean Air Act permits EPA to establish NCPs within certain specified statutory limits. By regulation, EPA has specified certain additional criteria that must be met for EPA to establish the availability of NCPs and set an NCP amount for a given emission standard. In establishing NCPs for the 2010 NO<sub>x</sub> standard available to heavy heavy-duty engines in model years 2012 and 2013, and proposing to establish NCPs available to medium and heavy heavy-duty engines in model years 2012 and later, EPA has not met these statutory and regulatory requirements.

***A. There Is No New or Revised Emission Standard in 2012***

First, there must be a new or revised emission standard that is more stringent than the previous standard for the pollutant, or the existing standard for the pollutant must become more difficult to achieve because of a new or revised standard.<sup>1</sup> Here, there is no new or revised NO<sub>x</sub> standard; the standard is the same for 2012 as it was for 2010, and it was promulgated in 2001 with adequate notice to manufacturers. All of EPA's previous NCP rulemakings were conducted before or at the same time that the emission standards were taking effect. Most were established one to two years before the standard became effective—e.g., NCPs for the 2004 standards were promulgated in 2002, two years before the standards become effective. It is now 2012, eleven years after the NO<sub>x</sub> standards were promulgated in 2001 and two years after the NO<sub>x</sub> standard become fully effective. The regulatory provisions cannot reasonably be read to allow for such a belated NCP determination.

In attempting to justify its establishment of NCPs, EPA conveniently ignores the fact that it is now 2012 and instead focuses on the fact that the 2010 NO<sub>x</sub> standard was lower than the 2004 standard. EPA also states: "*When promulgated* [i.e., in 2001], the Agency concluded that the 0.20 g/bhp-hr NO<sub>x</sub> standard was a technology forcing standard."<sup>2</sup> EPA's conclusion eleven years ago

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<sup>1</sup> 40 C.F.R. § 86.1103-87(a).

<sup>2</sup> See 77 Fed. Reg. at 4,738 (emphasis added).

has no bearing on whether there now exists a new or revised and more stringent emission standard applicable to the current 2012 model year for which EPA seeks to set NCPs.

***B. Substantial Work Is No Longer Required to Meet the 2010 NOx Standard***

Second, EPA must find that substantial work will be required to meet the emission standard.<sup>3</sup>

Substantial work is defined as “the application of technology not previously used in an engine or vehicle class or subclass, or the significant modification of existing technology or design parameters, needed to bring the vehicle or engine into compliance.”<sup>4</sup> EPA cannot find that substantial work is required to meet the 2010 NOx standard now that SCR has been used—successfully—in heavy-duty diesel engines, including engines manufactured by Navistar Inc. for other markets.<sup>5</sup>

The rest of the industry was able to implement SCR in time to meet the 2010 NOx standard. Now, nonconforming manufacturers face a much easier task to implement SCR technologies since their competitors have laid out the difficult groundwork, developing the technology, gearing up suppliers, and establishing the necessary infrastructure required for an effective SCR solution. EPA has recognized that this situation, where all engine manufacturers except one have already met the standard, cannot justify a “substantial work” finding, where the Agency said: “Obviously, *substantial effort would not be required if many manufacturers’ vehicles/engines were already meeting the revised standard or could do so with relatively minor calibration changes or modifications.*”<sup>6</sup> While substantial work was required before model year 2010, it can no longer be said to be needed in 2012, two years after SCR was implemented in the same class of engine by every other manufacturer in the industry. For EPA to insist otherwise gets the regulatory analysis backwards. Such an approach would justify NCPs any time new technology is used to meet an emission standard—a result Congress surely did not intend under the Clean Air Act.

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<sup>3</sup> 40 C.F.R. § 86.1103-87(a)(1).

<sup>4</sup> 40 C.F.R. § 86.1103-87(b).

<sup>5</sup> See MWM International Press Release, <http://www.navinternational.com.br/default.asp?su=7&pa=detalhes&fo=releases&id=82> (Nov. 22, 2006) (indicating that Navistar’s wholly owned subsidiary MWM International “has opted to use SCR system for heavy applications, such as trucks” in Brazil); see also Navistar MaxxForce 9.3H Engine Brochure (using SCR aftertreatment to meet Euro V emission standards).

<sup>6</sup> 50 Fed. Reg. 35,374, 35,403 (Aug. 30, 1985) (emphasis added).

### C. *There Is No Technological Laggard*

Third, EPA must find that there is likely to be a technological laggard,<sup>7</sup> which EPA has explained is “a manufacturer who cannot meet the emission standard due to technological (not economic) difficulties and who, in the absence of NCPs, might be forced from the marketplace.”<sup>8</sup> The distinction between true technological laggards and economic laggards—particularly intentional economic laggards—is critical here. “NCPs were intended to give a manufacturer *that has made every effort to comply*, but has been unable to achieve compliance, a chance to continue to participate in the market.”<sup>9</sup> As EPA has said: “An emission standard may become more difficult to meet and substantial work may be required for compliance, but if that work *merely involves transfer of well-developed technology from another vehicle class*, it is *unlikely that a technological laggard would develop*.”<sup>10</sup>

It is undisputed that SCR is a proven technology adopted by the rest of the industry, and at the end of this rulemaking EPA should recognize that the work involved in meeting the 2010 NOx standard now merely involves the transfer of well-developed technology and that no technological laggard exists.

To the extent EPA considered this factor in proposing to establish NCPs, it offered an ill-fitting justification. According to EPA, the nonconforming manufacturer is a “technological laggard” because it “intends to use a different technology to meet the NOx standard . . . . Since it has not yet submitted an application for certification for any model year 2012 heavy heavy-duty diesel engines that would not require emission credits . . . .” In fact, on January 31, 2012—the same day that the Interim Final Rule was published in the Federal Register and the NCPs took effect, the nonconforming manufacturer submitted a certification application for a 0.20 g/bhp-hr engine to

<sup>7</sup> 40 C.F.R. § 86.1103-37(a)(2).

<sup>8</sup> 67 Fed. Reg. 51,464, 51,465 (Aug. 8, 2002).

<sup>9</sup> *United States v. Caterpillar, Inc.*, 227 F. Supp. 2d 73, 88 (D.D.C. 2002) (emphasis added).

<sup>10</sup> 67 Fed. Reg. at 51,465 (emphasis added).

EPA.<sup>11</sup> Accordingly, a critical factual predicate of EPA's rulemakings has been proven incorrect on the same day that it published its Interim Final Rule and Notice of Proposed Rulemaking in the Federal Register.

Thus, engine manufacturers apparently have a choice of two technology paths for compliance: the EGR technology solution promoted as capable of meeting the standard for years by Navistar; or the SCR technology proven by the rest of the industry in use for more than two years. The indisputable existence of either engine technology makes it impossible for EPA to conclude that there is a technological laggard, or that "substantial work" is still required.

### **III. EPA Has Not Met Statutory Requirements for Determining the Appropriate Penalty Amount**

Even if EPA erroneously concludes that the regulatory pre-requisites have been met, the Agency still must establish a penalty that is at the level expressly required by the Clean Air Act. The Act mandates that any NCP set by EPA must "remove any competitive disadvantage to manufacturers whose engines or vehicles achieve the required degree of emissions reduction."<sup>12</sup> The penalty levels set forth in the Interim Final Rule and NPRM do not meet this statutory obligation. The NCP amount proposed by EPA in the NPRM, and set in the Interim Final Rule, comes nowhere near approximating the true cost of producing an engine that is compliant with the 2010 NOx standard. EPA's proposal sets a maximum penalty of \$1,919 per heavy-heavy duty engine, for engines that emit more than double the standard. EPA's current figure is a fraction of the \$12,210 penalty it established for the same degree of NOx exceedance for the 2004 NOx standard, which

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<sup>11</sup> See Navistar Press Release, Navistar Hosts Analyst Day; Company formally submits EPA certification data for 0.2g NOx in-cylinder engine, <http://www.navistar.com/Navistar/News/Newsroom#> (Feb. 1, 2012) ("The company also announced it formally submitted its 0.2g NOx in-cylinder engine certification data to the United States Environmental Protection Agency."); see also TruckingInfo.com, Customers Wouldn't Pay Extra for Any Non-Compliance Penalties Imposed on Navistar, Hebe Says, [http://www.truckinginfo.com/news/news-detail.asp?news\\_id=75958&news\\_category\\_id=36](http://www.truckinginfo.com/news/news-detail.asp?news_id=75958&news_category_id=36) (Feb. 1, 2012) ("Navistar is ready with an engine that does meet the 0.2-gram NOx limit, and it submitted its specifications to the EPA on Tuesday [January 31, 2012].").

<sup>12</sup> CAA § 206(g)(3)(E), 42 U.S.C. § 7525(g)(3)(E).

was EPA's most recent prior NCP rule for heavy-duty diesel engines.<sup>13</sup> Unlike the 2010 NOx standard, which to-date has required a new type of emissions control technology, the entire industry met the 2004 NOx standard using in-cylinder emissions control strategies that had already been developed. EPA has provided no technical explanation for why the current standards, which to date have only been met by using new SCR technology, are not more costly than the NCPs for the 2004 NOx standard.

In fact, the NCP level is so low that compliant manufacturers are effectively being forced to consider manufacturing engines that do not meet the NOx standard in order to exploit the competitive advantage afforded by the below-market NOx NCP. The NCP regulations do provide all manufacturers the option of EPA provided NCPs, not just one manufacturer. The only solution for this result is for the Agency to ensure that the NCP penalty is in fact high enough to encourage full compliance with the NOx standard by those manufacturers who possess the necessary emissions control technology.

#### **EPA's Proposed Penalty Level is too Low for a Number of Reasons:**

##### **1. *Baseline Engine***

EPA's NPRM does not adequately reflect the actual costs of incorporating compliant technology in large part because it assumes a baseline engine that already utilizes SCR technology. But the company that needs NCPs does not already have SCR technology in place on any of its U.S. engines. Further, neither did the complying manufacturers utilize SCR technology when the standard was promulgated in 2001. The complying manufacturers invested in the research and development, hardware components, software, infrastructure, and other advancements necessary to design and produce new engine and aftertreatment designs that are actually compliant with the 2010 NOx standard—investment that Navistar has thus far chosen not to make. It is unreasonable, and unfair, to give nonconforming manufacturers the benefit of assuming a baseline engine that

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<sup>13</sup> See EPA, Regulatory Announcement: Nonconformance Penalties for Heavy-Duty Diesel Engines (August 2002).

incorporates the very technology that they chose not to adopt. By assuming a baseline engine with SCR technology and factoring in only the incremental costs associated with adjusting that SCR technology from a 0.50 to a 0.20 g/bhp-hr NO<sub>x</sub> emission level, EPA has completely vitiated the NCP calculation and the intent of the Clean Air Act.

## ***2. EPA's Approach to Fuel Economy Is Erroneous***

EPA has indicated that one of the reasons it chose an engine with SCR technology as the baseline engine was for the purpose of addressing the wide range of fuel economy performance between engines using different emissions control technologies. EPA's fuel economy concerns are misplaced and have resulted in an irrational and arbitrary cost methodology. In the past, EPA appropriately attempted to capture all of the additional costs burdens that accrue to compliant manufacturers in connection with their use of compliant engines. These costs included the present value of a compliant manufacturer's reduced fuel economy because purchasers would value compliant trucks less, and this fuel economy penalty could be translated to a reduced purchase price and thus an increased burden on compliant manufacturers. In this case, the company seeking NCP's has repeatedly claimed that its emissions technology results in the same or better net "fluid economy" and thus there is no net benefit to operators associated with SCR. Accordingly, EPA should not predicate its rule on a nonexistent hypothetical baseline engine with SCR simply to address an operating cost disparity that does not exist, according to the company seeking the NCPs.

## ***3. Costs of A Compliant Engine Are Understated***

EPA's past NCP rulemakings have established a number of costs that the Agency has determined should be included in calculating the level of NCP penalties. These costs include: research and development costs; hardware costs; warranty, repair and associated costs; revenue impact of additional vehicle weight; and purchaser perception effects.<sup>14</sup> If EPA had included these costs in calculating the penalty level in the NPRM and Interim Final Rule, it would have identified a

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<sup>14</sup> See, e.g., 67 Fed. Reg. 2,169-70 (proposed Jan. 16, 2002)

penalty at the upper limit that is many times higher than what was included in the proposal. EPA should consult more carefully with compliant manufacturers to insure that it has captured ALL of the costs of actual compliance, and reflect that significantly higher amount in any final rule that is generated. We would be happy to share our actual costs with EPA on each of these elements in a setting that insures that our proprietary cost information will be maintained as confidential business information by the Agency and not disclosed to the public.

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The opportunity for compliant manufacturers to comment, on the record, is especially important in the context of NCP rulemaking, because the statute authorizing NCPs requires the agency to insure that the NCP does not result in any competitive disadvantage to compliant manufacturers. The only way to insure that is to carefully and thoroughly consult with compliant manufactures, and to fully understand all of the costs associated with their compliance. Thus we appreciate this opportunity to comment, and look forward to providing more detailed input to the Agency on all of these issues.